Supreme Court, U.S.
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No. 96-1515

In The

Supreme Court of the United States

October Term, 1996

THOR CHRISTENSEN and
JOSEPH WOODROW PANKEY, JR.,
Petitioners,

v.

MICHAEL D. GRIFFES, COMMISSIONER
OF MOTOR VEHICLES,
Respondent.

Petition For A Writ of Certiorari
To The Supreme Court Of The State Of Vermont

REPLY BRIEF FOR THE PETITIONERS

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REPLY BY PETITIONERS

While Respondent might prefer to retain interest which the State of Vermont has earned on unconstitutional state taxes, his Brief in Opposition suggests why review by this Court is appropriate. Like the Vermont Supreme Court and the Supreme Courts of Ohio and Oregon, Respondent seizes on the "flexible remedy" language in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), to justify keeping substantial amounts of interest on funds which the State of Vermont never should have collected in the first place. Respondent does not deny that, without interest, the tax refund offered by the State falls far short of restoring Petitioners to the position they "should have occupied absent any Commerce Clause violation." *McKesson*, 496 U.S. at 42.[1] Nor does he dispute that, by appropriating the interest, the State has forced the Petitioners "alone to bear public burdens," just because they were unfortunate enough to be subject to an unconstitutional tax. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Petitioners seek certiorari to resolve differences over what the Due Process and Just Compensation Clauses require

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[1] Even at a modest six percent rate, the interest on Petitioner Christensen's funds amounts to 70 percent of principal and on Petitioner Pankey's funds to almost 60 percent, since both Petitioners paid in the mid-1980's. *See* Petition For A Writ of Certiorari at 17 n.7. Altogether, interest on the unconstitutional taxes amounts to at least $3 million over the 14-year period they were collected. *Id.* at 18 n.8. Such an amount cannot be disregarded as *de minimis* or overlooked as an administrative expense.

in the context of post-deprivation relief.[2] Under *McKesson*, Respondent urges, a State need only provide "meaningful backward looking relief" and "a clear and certain remedy" to satisfy due process requirements. Brief In Opposition at 8.[3] The difficulty with Respondent's argument is that it provides no way of determining what an adequate remedy is. A State might decline to pay any tax refund at all for twenty years, or it might limit a refund to 85 percent of the principal. In either case, a State could declare that its remedy was "clear and certain" and provided "meaningful backward looking relief."

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[2] Respondent suggests that the lower courts are not divided. Brief in Opposition at 9. Petitioners would note, however, that the court in *Evans v. City of Chicago*, 522 F.Supp. 789, 796-800 (N.D. Ill. 1980), held that the city's practice of delaying payment of judgments against it from two to four years did violate the Due Process Clause. In addition, the Seventh Circuit has held that any post-deprivation remedy which ignores loss of use does not satisfy due process. *See Bonner v. Coughlin*, 517 F.2d 1311, 1312-14 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). Moreover, as a practical matter there is a deep division in the jurisdictions as to whether taxpayers are entitled to interest on tax refunds. *See* Petition at 11-13 & n. 5.

[3] Respondent also cites *dicta* from *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 524 n.31 (1981), to argue that this Court considers a tax refund of principal only to be an adequate remedy. *See* Brief in Opposition at 11, 12. While *Rosewell* did point out cases where interest apparently was not awarded *sub silentio*, it did not suggest that the Court would allow a State to retain interest on unconstitutional taxes if directly confronted with the issue.

The inevitable result of such an *ad hoc* approach will be widely-varying remedies for the same constitutional wrong.[4]

This Court appeared to provide a clear, workable, and common sense limiting principle in *McKesson*, but Respondent and the State Courts have refused to acknowledge it. *McKesson* said that a State's post-deprivation remedy must restore the *status quo ante* by putting taxpayers back in the same position they would have enjoyed but for the State's constitutional violation. Unlike the decision below, such a rule does not reward states who decline to provide pre-deprivation relief, nor does it lessen the incentive for states to respect constitutional requirements in enacting tax legislation.

Respondent also suggests that the Just Compensation principles established in *Webb's* should not apply in this case. He attempts to distinguish *Webb's* on the grounds that it "was not a tax case" but rather involved "'private property' held for the purpose of making a distribution among private creditors." Brief in Opposition at 11. Yet Respondent does not explain why the State of Vermont should be entitled to use the proceeds from an illegal tax without compensation, while Florida is forbidden from doing so with money in an interpleader fund which is perfectly valid and legal. One might have supposed that Florida would have the better claim, since in *Webb's* payment was made by the parties voluntarily with full knowledge of the consequences, rather than compelled by threat

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[4] Such variations already exist. As discussed in the Petition, federal retirees in Virginia received interest when unconstitutional taxes on their pension incomes were refunded by that State, whereas federal retirees in Oregon were denied it in the same circumstances. *See* Petition For A Writ of Certiorari at 9.

of sanctions and with no opportunity for a pre-deprivation challenge. Nor can Respondent plausibly argue that tax funds are exempt from the requirements of the Just Compensation Clause. *See Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 614-15 (1899); *Kohl Industrial Park Co. v. Rockland County*, 710 F.2d 895 (2d Cir. 1983); *Acker v. Commissioner*, 258 F.2d 568 (6th Cir.), *aff'd*, 361 U.S. 87 (1958).

Respondent makes one further argument which must be corrected. He suggests that the State of Vermont retained interest in this case as a *quid pro quo* for extending a one-year statute of limitations on tax refunds under Vt. Stat. Ann. tit. 12, §517. *See* Brief in Opposition at 1, 6. Not only is Respondent's argument unsupported by the record, it is simply wrong. In the first place, any statute of limitations for taxpayers was tolled when Petitioners filed their Complaint as a class action on June 17, 1986.[5] In the second, the Vermont Supreme Court expressly declined to adopt Respondent's argument that a one-year limitations period applies since

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[5] Following the Vermont Supreme Court's decision in *Williams v. State (Williams II)*, 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991), holding that motor vehicle tax refund requests had to be pursued administratively, Petitioners voluntarily dismissed their court action based on lack of subject matter jurisdiction and filed administrative refund requests on September 2, 1993. When Respondent took no action for the requests for four months, Petitioners filed this case in state court for a writ of mandamus, again as a class action. Under Vt. Stat. Ann. tit. 12, § 558(a)(2), there is a one-year tolling period for any case which is dismissed for lack of subject matter jurisdiction. Accordingly, any statute of limitations which may apply is still tolled.

section 517 does not govern administrative refund requests. As the State Supreme Court said:

> Neither Sec. 8914 nor any other provisions of chapter 219 of Title 32 ("motor Vehicle Purchase and Use Tax") specify a limitations period for actions before the Commissioner pursuant to Sec. 8914. *Cf.* 12 V.S.A. Sec. 517 (one-year limitation period on actions in court to recover taxes paid under protest). We do not here decide what, if any, statute of limitations is generally applicable to such actions.

Williams v. State, 589 A.2d 840, 847 n.10 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991).

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully Submitted,

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